

Michigan Journal of International Law

Volume 14 | Issue 1

1992

The Role of Legal Advisers in Ensuring that Foreign Policy Conforms to International Legal Standards

Antonio Cassese
European University Institute

Follow this and additional works at: <https://repository.law.umich.edu/mjil>



Part of the [International Law Commons](#), and the [Law and Politics Commons](#)

Recommended Citation

Antonio Cassese, *The Role of Legal Advisers in Ensuring that Foreign Policy Conforms to International Legal Standards*, 14 MICH. J. INT'L L. 139 (1992).

Available at: <https://repository.law.umich.edu/mjil/vol14/iss1/4>

This Essay is brought to you for free and open access by the Michigan Journal of International Law at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Journal of International Law by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

THE ROLE OF LEGAL ADVISERS IN ENSURING THAT FOREIGN POLICY CONFORMS TO INTERNATIONAL LEGAL STANDARDS

by Antonio Cassese*

INTRODUCTION

International crises—such as those fueled by Nasser's 1956 nationalization of the Universal Maritime Suez Canal Company,¹ the 1961 Cuban Missile Crisis,² and the 1985 terrorist hijacking of the Italian cruise ship *Achille Lauro*³—naturally excite the academic community. In their quest to understand and analyze world events, scholars predictably pore over crucial documents compiled by the politicians, diplomats, and lawyers who chronicled important details of a given crisis. Through these papers, scholars can trace the input of these individuals from the commencement of the international dispute until its resolution. But relying solely on such documents has shortfalls: their scope is limited to detailing the events of a single crisis, and they tell only as much about the translation of law into policy as is necessary to justify the claims of the different actors. The documents do not serve to illustrate on a broader scale the extent to which foreign policy is controlled by legal standards.

In order to appraise the effectiveness of international law, I

* Professor of International Law, European University Institute, Florence, Italy.

This research project has been financed partly by the European University Institute, and partly by a grant of the Italian National Council for Research, research contract CNR No. 89.00981.09.

I would like to thank my former research associates, Ms. S. Marks, now a fellow of Emmanuel College, Cambridge, and an assistant lecturer in international law at Cambridge University, and Dr. A. Clapham, who is currently the Amnesty International representative to the United Nations, for helping me with great skill and competence, both in drafting the questionnaires and in interviewing a number of people. I am also beholden to Mr. M. Davidoff from the University of Michigan Law School, and Ms. D. Warner from Yale Law School for assisting in the preparation of a first draft of this paper. Finally, I am most grateful to my secretary Ms. E. Zaccardelli, for carefully transcribing all the taped interviews and typing up this paper.

1. For a discussion of the Suez Canal Crisis, see SELWYN LLOYD, *SUEZ 1956: A PERSONAL ACCOUNT* (1978); Geoffrey Marston, *Armed Intervention in the 1956 Suez Canal Crisis: The Legal Advice Tendered to the British Government*, 37 INT'L & COMP. L.Q. 773 (1988).

2. See ABRAM CHAYES, *THE CUBAN MISSILE CRISIS* (1974); ROBERT F. KENNEDY, *THIRTEEN DAYS: A MEMOIR OF THE CUBAN MISSILE CRISIS* (1969).

3. See ANTONIO CASSESE, *TERRORISM, POLITICS AND LAW: THE ACHILLE LAURO AFFAIR* (1989).

thought a *different* vantage point might prove useful—a vantage point that is less academic and historical, and more action-oriented and practical. I chose to look at how those people who, in their official capacity, daily apply, interpret, and possibly suggest breaching international law. I set out to probe the attitude these individuals take toward international legal standards. In particular, I wanted to examine the extent they are able or willing to use international legal standards, and perhaps impress upon policymakers the idea that such standards should be one of the guiding factors of foreign policy. To put this different vantage point into practice, I resorted to a method that is not normally used by international legal scholars: *interviews*.

With the help of a research team, I spoke to the people most responsible for using—or ignoring—international law today: present and former foreign ministers and their chief legal advisers, hereafter referred to as LAs.⁴ From them, I hoped to get direct and first-hand evidence on the role played by international law in today's political arena.⁵ I trust that by sounding them out as thoroughly as we did, it is now possible to shed some light on the role played by law and lawyers in foreign affairs. Part I of this essay will describe the LAs' role in foreign policy-making and the institutional structure under which they operate. Part II will explain how international law influences the extent foreign ministers will heed the LAs' advice and how LAs, in turn, are able to influence the evolution of international law. In Part III, I will summarize what we learned in our interviews. Finally, Part IV

4. Officials from the following countries were involved in the research project: Brazil—the Legal Adviser [hereafter LA]; Bulgaria—the LA; Ireland—two former foreign ministers [hereafter FM], a former prime minister, a former attorney general, the LA, two members of the Office of the Attorney General, a former LA, and a former Deputy LA; France—the LA and a former LA; Hungary—the LA and a former LA; Israel—the LA and a former LA; Italy—the LA; the Netherlands—a former FM, a former undersecretary for European affairs and the LA; Switzerland—the LA; the United Kingdom—the LA and a former Deputy LA; United States—a Deputy LA, a member of the Office of the LA, a former LA, a former Deputy LA, and an assistant general counsel to the Dept. of Defense.

5. Our commitment to all the interviewees to keep confidential some delicate issues raised in our interviews has prompted me to refrain from both mentioning their names and referring to special events or considerations that they regarded as strictly confidential. Our assurances of confidentiality allowed our interviewees to tell us of events or positions not yet publicly known. All officials and former officials were interviewed in private, often in their respective capitals, on the basis of a long questionnaire.

Some of those who were interviewed in Florence also gave a public lecture on the topic and published their remarks in Symposium, *The Impact of International Law on Foreign Policy-Making: The Role of Legal Advisers*, 2 EUR. J. INT'L L. 131, 132-64 (1991). The text of the lectures include: Stephen M. Scheibel, *Remarks on the Role of the Legal Advisor to the U.S. State Department*, *id.* at 132; Gilbert Buillaume, *Droit international et action diplomatique: Le cas de la France*, *id.* at 136; Mathias Krafft, *L'attitude de la Suisse à l'égard du droit international*, *id.* at 148; Arthur D. Watts, *International Law and International Relations: United Kingdom Practice*, *id.* at 157.

will offer some suggestions for enhancing the role of international law in developing foreign policy.

But first, I should note that our interviews are limited in two important ways. With only four exceptions—Brazil, Bulgaria, Hungary, and Israel—we spoke only to ministers and LAs of Western countries. This is due, in part, to the fact that Western officials were more willing to participate in our study, and, in part, to financial restraints.⁶ Second, we spoke with individuals from a variety of backgrounds, who participated in the study with varying degrees of commitment and preparation. Although they were all cooperative and forthcoming, some of them may have exaggerated their roles or that of their agencies, while others may have done the opposite out of modesty or skepticism. Of course, when dealing with individuals, researchers must ensure that the vagaries of personality do not intrude upon the ultimate analysis. Most of the people with whom we spoke were admirably candid and straightforward, and this warning is simply one which the careful reader should consider regardless of whether we were careful enough to apply it to ourselves.

I. LEGAL ADVISERS AND THE MINISTRIES THEY SERVE

The LAs we interviewed work primarily in the foreign ministries of their respective countries. Although the structure of these offices varies from nation to nation, the legal advisers' functions are strikingly similar. I will begin by describing the LA's role before turning to various factors that influence the LA's power to affect foreign policy decisions.

A. *The Role of the Legal Adviser*

LAs play various roles within the confines of their foreign ministries. According to our interviewees, these roles vary little from country to country. First of all, LAs must attend to the daily affairs of the office. This includes handling all low-level crises, from the treatment of foreign nationals to simply going through the masses of information the office receives on a regular basis. Membership in international organizations often entails technical work for which the lawyer seems uniquely qualified, such as drafting resolutions, commenting on draft resolutions tabled by other States, or preparing responses to questionnaires and requests for legal information from the international organ-

6. The absence of Third World perspectives in this study should in no way be construed as reflecting negatively on those countries.

ization. Only Switzerland, which divides its office in two, keeps its "legal counselor" away from these subjects.

Other LA tasks are less regular but equally traditional, such as the drafting and negotiation of treaties. Here, legal acumen and training are at a premium; some countries even prefer to have an entirely separate office for this work. Regardless of the office responsible for the actual conclusion of treaties, lawyers clearly take their direction from others in that department. They do not enter negotiations with *carte blanche* authority, but rather serve entirely as draftsmen. Furthermore, not every treaty signed merits the LA's attention. In France, for instance, the LA looks at only a handful of the three or four hundred treaties signed annually.⁷ In Switzerland, where each ministry must consult with all other ministries before taking proposals to the cabinet, a system called "co-reporting," the LA may be asked by his minister to review any treaty which might otherwise have gone without the LA's analysis.

LAs also traditionally represent or advise their governments in international litigation, although this role has spread to other government ministries as regional organizations have become increasingly influential in international affairs. Some regional bodies—notably the European Community and the Council of Europe, with its European Commission and Court of Human Rights—have become so entrenched that litigating issues involving such organizations has become routine work for the lawyers of other ministries. For instance, cases before the European Commission or Court of Human Rights often are dealt with by lawyers from the justice ministries of a number of countries, including France, Switzerland, and Italy. Still, LAs remain involved in litigating matters before other international courts, such as the various arbitral courts or the International Court of Justice.

In no country surveyed was the LA's office responsible for dealing with parliament, except indirectly as an adviser to a minister preparing parliamentary proposals. In Italy, the LA may also be responsible for drafting speeches on international law to be delivered by the minister. Other countries seem to restrict the LA's speech-writing role to simple consultation.

The LA's precise role becomes the most difficult to define when it involves doing what the title requires: advise. In practice, it is impossible to generalize about what an LA can do in this field. The scope of the advisory role depends to a great extent on how much advice is sought, and to a lesser extent on the LA's own initiative in offering

7. The other treaties are scrutinized by lawyers from other staffs.

advice independently. At the same time, several of the LAs with whom we spoke referred to the rapidity with which they are obliged to transform themselves from *objective expounders of law* before an action is taken by the president, the foreign minister, or the cabinet, to *subjective advocates* of their governments' positions after an action is taken by the executive branch, sometimes contrary to the LA's suggestion. As one LA put it, when acting as an objective expounder of the law, LAs must give "an unvarnished objective opinion of what the legal situation is." When they later must act as "advocates," LAs switch hats and play the role of "barrister for the government." According to a number of LAs, the major problem with the advocate role is that often they are called in when the trouble has already started, whereas they would much prefer to step in when the trouble still could be avoided.

Even as "national advocates," however, LAs must act prudently and must carefully consider the costs and benefits of interpreting rules in the manner most beneficial to the national interest. For instance, the United States has long resisted interpreting the self-defense provisions of the United Nations Charter to allow anticipatory strikes, fearing that the resulting definition would be so vague as to allow unwarranted uses of force.⁸ Israel, on the other hand, has several times justified actions such as their bombing of an Iraqi nuclear reactor⁹ by interpreting the U.N. Charter exactly in the manner the United States has tended to eschew.

According to our interviews, incidents that held the potential for LA involvement tended to fall into three categories: (a) the LA was immediately called in to give his advice, (b) the LA was kept out of the decision-making process, or (c) the LA was only consulted after the event to provide some justification for action already under way.

As an example of the first category, immediate LA involvement, when the United States took forcible action against Libya in the 1980s,¹⁰ the American LA was very much involved from the outset.

8. See Rosalyn Higgins, *The Attitude of Western States Toward Legal Aspects of the Use of Force*, in *THE CURRENT LEGAL REGULATION OF THE USE OF FORCE* 435, 442-44 (A. Cassese ed. 1986).

9. Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1635 (1984); see also Antonio Cassese, *Return to Westphalia? Considerations on the Gradual Erosion of the Charter System*, in *THE CURRENT LEGAL REGULATION OF THE USE OF FORCE*, 510, 512, 515 (A. Cassese ed. 1986); Jean Combacau, *The Exception of Self-Defence in U.N. Practice*, in *THE CURRENT LEGAL REGULATION OF THE USE OF FORCE* 17, 24 (A. Cassese ed. 1986); Anthony D'Amato, *Israel's Air Strike Upon the Iraqi Nuclear Reactor*, 77 AM. J. INT'L L. 584 (1983).

10. See, e.g., Steven R. Weisman, *U.S. Bans Imports of Oil From Libya*, N.Y. TIMES, Mar. 11, 1982, at A1, A10; see President's Address to the Nation: United States Air Strike Against Libya, 22 WEEKLY COMP. PRES. DOC. 491 (Apr. 14, 1986); see generally, Yehuda Z. Blum, *The*

According to one interviewee, through this participation one could see a rapid elimination of options for dealing with the situation. First there were economic sanctions, then diplomatic representations, then European sanctions, as well as expulsions of Libyans from European countries. The bomb attack on the Berlin discotheque in 1986 was the last straw.¹¹ Having exhausted all peaceful means, the United States decided to resort to military means.

American LAs have also played a role in other areas. Thus, for instance, when the United States decided to send troops to Grenada in 1983,¹² a former LA told us he was involved from the outset and was able to give important legal advice. Similarly, when the U.S. Department of Justice decided to freeze foreign assets in the course of law enforcement over money-laundering operations, State Department LAs suggested that in some cases there could be a problem with sovereign immunity and consequently advocated a cooperative, rather than confrontational, approach. As a result, U.S. policy was changed and a new procedure was adopted that required members of the LA's office to sign all memoranda.

Other cases of early LA involvement have occurred in Hungary. In 1989, nationals of the German Democratic Republic fled to the Federal Republic of Germany through Hungary, abandoning hundreds of cars.¹³ The Hungarian LA was immediately asked to advise whether these cars should be handed back to their owners or turned over to East German authorities. He suggested that the first alternative was more in keeping with the law. In another case, Czechoslovakian youths hijacked a Hungarian plane, forcing it to land in the Federal Republic of Germany.¹⁴ The same Hungarian LA was consulted immediately about whether Hungary should request extradition of the hijackers. He strongly suggested that it should, because this was demanded by the U.N. Convention on Hijacking.¹⁵ But policymakers disregarded this advice and decided that political considerations required them to refrain from requesting extradition. So they left this

Gulf of Sidra Incident, 80 AM. J. INT'L L. 668 (1986) (discussing the origins and background of the U.S.-Libya dispute regarding the Gulf of Sidra).

11. President's Address to the Nation: United States Air Strike Against Libya, *supra* note 10, at 492.

12. For a discussion of the United States' invasion of Grenada, see WILLIAM C. GILMORE, *THE GRENADA INTERVENTION* (1984).

13. *Hungary to Return Vehicles*, N.Y. TIMES, Nov. 11, 1989, at A13.

14. *[Two] Teen-Age Gunmen Hijack Hungarian Jetliner and Seek Asylum in Germany*, N.Y. TIMES, Mar. 30, 1989, at A10; see *Hungarian Airliner Hijacked in Prague*, UPI, Mar. 29, 1989, available in, LEXIS, Nexis Library, UPI file.

15. Convention on Offenses and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, 20 U.S.T. 2941, 704 U.N.T.S. 219.

option to Czechoslovakia instead.¹⁶

Instances in which policymakers did *not* consult LAs apparently include the United States' decision to send troops to the Dominican Republic in 1965 during the Dominican revolution,¹⁷ and U.S. President Jimmy Carter's attempt to rescue the U.S. hostages in Iran.¹⁸ Nor were lawyers consulted with regard to the Iran-Contra affair.¹⁹ Apparently, France also failed to consult its LA before ordering the sinking of the *Rainbow Warrior*,²⁰ nor did it consult its LA before the secret intelligence agents responsible for sinking the ship were returned to France.²¹

In the third category, various foreign ministries initially did not consult the LA and then later had second thoughts. For instance, during the Falkland (Malvinas) conflict,²² Irish authorities first went along with the European Community decision²³ about trade sanctions against Argentina. Subsequently, after consulting their LA, Irish officials concluded that these sanctions were contrary to the laws of neutrality and consequently discontinued them.

There are other cases when LAs, although not consulted before a political decision was made, were nevertheless able to influence the course of events by promptly stepping in on their own initiative. One

16. Ultimately, West German officials did not extradite the hijackers but brought them to trial in West Germany. *Czechoslovak Teens Get Probation in Jet Hijack*, CHI. TRIB., Aug. 30, 1989, at C12. (North Sports Final Ed.).

17. For a discussion of the United States' role in the Dominican revolution, see JEROME SLATER, INTERVENTION AND NEGOTIATION: THE UNITED STATES AND THE DOMINICAN REVOLUTION (1967); A.J. Thomas, Jr. and Ann Van Wynen Thomas, *The Dominican Republic Crisis 1965*, THE NINTH HAMMARSKJÖLD FORUM 1-36, May 2, 1966 (John Carey ed. 1967).

18. See Harold H. Saunders, *Diplomacy and Pressure, November 1979—May 1980*, in AMERICAN HOSTAGES IN IRAN 142-43 (Paul H. Kreisberg ed. 1985).

19. In the United States all matters involving covert activities or armed intervention are subject to review by a senior interagency group composed of lawyers from the State Department, the Department of Defense, the Central Intelligence Agency, and the National Security Council. All such combined legal efforts are conducted under the aegis of the National Security Council.

For a discussion of the Iran-Contra affair, see THEODORE DRAPER, A VERY THIN LINE: THE IRAN-CONTRA AFFAIR (1991); HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR (1990).

20. Richard Bernstein, *France Concedes its Agents Sank Greenpeace Boat*, N.Y. TIMES, Sept. 23, 1985, at A1; Richard Bernstein, *Official Said to Have Ordered Ship 'Neutralized'*, N.Y. TIMES, Sept. 25, 1985, at A4.

21. The French LA, however, was actively engaged in the defense of France in claims filed by New Zealand as a result of the second incident. *France Now Closes the Book on Affair Over Greenpeace*, N.Y. TIMES, July 30, 1986, at A4; Paul Lewis, *[Two] French Agents in Ship's Bombing Will Be Released*, N.Y. TIMES, July 7, 1986, at A1.

22. For a discussion of the Falkland (Malvinas) conflict, see ENRIQUE FERRER VIEYRA, AN ANNOTATED LEGAL CHRONOLOGY OF THE MALVINAS (FALKLAND) ISLANDS CONTROVERSY (English lang. ed. 1984); RAPHAEL PERL, THE FALKLAND ISLANDS DISPUTE IN INTERNATIONAL LAW AND POLITICS: A DOCUMENTARY SOURCEBOOK (1983).

23. See *Community Solidarity in the Falklands Conflict*, 15 BULL. OF E.COMM. no. 4, at 1.1.5, 1.1.7 (June 1982).

LA from a relatively small country mentioned a case where he had been able to prevent a major political decision which would have amounted to a serious breach of international law. After the nation's cabinet, without any prior consultation with the LA, decided to denounce a major international treaty, the LA was able to persuade the prime minister that such a step, in addition to being politically unwise, was contrary to international law and would not produce the legal effects sought. In that LA's opinion, it was the latter argument that convinced the prime minister, who became aware that the denunciation would not have been effective to release the State from its legal obligations in a short span of time, and would have had serious repercussions on public opinion.

There also are cases when the LA was not consulted simply because the authorities who made the decision did not have time for such consultation. Thus, during the Falkland (Malvinas) conflict, the sinking of the Argentinean ship *Belgrano* by the British Navy²⁴ was decided by the highest authorities in charge of the conflict and not cleared with the LA. However, the LA previously had been consulted on the rules of engagement for the British army and navy.

Finally, there are instances in which LAs were asked after the fact to provide some sort of justification for the action in question. In the Entebbe case, the advice of Israeli LAs was sought only after the Israeli planes had taken off for Uganda.²⁵ The planning stages of the raid were so shrouded in secrecy that no legal opinion was requested. But after the planes had left, although the issue was still acute, LAs were called in under orders not to communicate with the outside world. Similarly, American LAs were not consulted when U.S. officials decided to withhold U.S. funds from the United Nations.²⁶ When they were called in for advice, the LAs responded with the justification that the United Nations had exceeded its authority with regard to the Palestine Liberation Organization (PLO).²⁷ Nor were U.S. State Department LAs asked for advice before certain announcements

24. Edward Schumacker, *Argentina Confirms Loss of its Cruiser: Says 123 of 1,042 on Board Have Been Saved*, N.Y. TIMES, May 4, 1982, at A1; see Edward Schumacker, *Argentina Cruiser Damaged in British Submarine Attack Outside Falkland War Zone*, N.Y. TIMES, May 3, 1982, at A1; R.W. Apple, *London Reports New Clash at Sea*, N.Y. TIMES, May 4, 1982, at A1.

25. See generally, Leslie C. Greer, *Rescue at Entebbe—Legal Aspects*, ISRAEL Y.B. ON HUM. R. 312 (1976) (discussing legal implications of the rescue at Entebbe).

26. See Bernard D. Nossitter, *U.S. Will Not Pay a U.N. Assessment*, N.Y. TIMES, Dec. 31, 1982, at A1; see also Bernard D. Nossitter, *U.N. Chief Chides U.S. on Funds*, N.Y. TIMES, Jan. 4, 1983, at A4.

27. According to U.S. officials, the United Nations had exceeded its authority because, *inter alia*, it had granted the PLO observer status. Bernard D. Nossitter, *U.S. Will Not Pay a U.N. Assessment*, N.Y. TIMES, Dec. 31, 1982, at A1.

were made on the question of extraterritorial action for law enforcement, the so-called rendition. Once consulted, the LAs tried to highlight the international law problems that would be raised and the legal consequences this would have for prosecutors.²⁸

B. *Institutional Factors Affecting the Legal Advisers' Efficacy*

While LAs we interviewed all had similar tasks within their respective governments, the institutional structure of their offices varied greatly from country to country, which in turn influenced their effectiveness. Each of the present and former LAs we interviewed took great care to emphasize the role his office played in relation to the work of the foreign ministry in particular, and also to the government's overall structure. It became obvious that the institutional structure of the LA's office played a significant part in the effectiveness of the LA's advice as well as the very existence of that advice.

In the United States, for example, the LA has a rank equivalent to that of an assistant secretary. This places him midway through a departmental structure which includes the secretary of state, a deputy secretary, several under-secretaries, and about twenty fellow assistant secretaries. The LA's office is itself divided into sections which serve the various bureaus of the department.²⁹ Although each lawyer is part of the LA's office instead of a particular bureau, each lawyer will sit on the concerned assistant secretary's principal staff and also on the bureau directorate. The lawyer's presence at staff meetings is the main wellspring of the job's opportunities.³⁰ As Professor Macdonald

28. For a discussion on the extraterritorial reach of U.S. law enforcement and extradition policies, see *Oversight Hearing on the Authority of the FBI to Seize Suspects Abroad, before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary, United States House of Representatives*, 101st Cong., 1st Sess. (Nov. 8, 1989) (statements of William P. Barr, Assistant Attorney General, U.S. Dept. of State; Oliver B. Revell, Associate Deputy Director, Investigations, FBI; Abraham D. Sofaer, Legal Adviser, U.S. Dept. of State) (on file with the *Michigan Journal of International Law*); Press Remarks by James A. Baker III, Oct. 13, 1989 (on file with the *Michigan Journal of International Law*). See Andreas F. Lowenfeld, *U.S. Law Enforcement Abroad: The Constitution and International Law*, 83 AM. J. INT'L L. 880 (1989); Andreas F. Lowenfeld, *U.S. Law Enforcement Abroad: The Constitution and International Law, Continued*, 84 AM. J. INT'L L. 444 (1990); see also *United States v. Alvarez-Machain*, 112 S. Ct. 2188 (1992) (holding that a government-sponsored abduction of a criminal defendant in violation of extradition treaties will not place that defendant outside of the jurisdiction of U.S. courts).

29. The U.S. State Department's Office of the Legal Adviser consists of approximately 100 attorneys and a similar number of support staff. Its organization corresponds closely to the State Department's overall bureaucratic structure. The office has five offices organized according to world regions, each with an assistant LA and an attorney, and fourteen functional offices—in such areas as consular affairs, economics, business, communication, human rights, refugees, law enforcement, and intelligence—which may have up to three attorneys, in addition to an assistant LA. The nineteen assistant LAs report directly to the LA by way of weekly written reports. The assistant LAs also attend a weekly staff meeting, which is presided over by one of the deputy LAs. The LA spends much of his time traveling and would normally not attend those meetings.

30. LAs refer to these bureaus as their "clients."

points out, in the U.S. State Department

the lawyers and the policy officers work together; and this enables the lawyers to call attention to legal problems as they arise in operation. The lawyers thus perform an active and creative role, rather than a passive or 'waiting-to-be-consulted' role.³¹

While the United States provides an exemplary model, the United Kingdom's system is also important. In many respects it is similar to the U.S. model but proves perhaps less effective on account of the limited staff of the Office of the LA.

The cornerstone of the British system is the care taken to integrate legal advisers into the departments they serve. The Foreign Ministry employs twenty-six legal advisers, only twenty of whom serve in London.³² All of the advisers are fully qualified to practice law, either as barristers or solicitors.³³

The ministry itself has approximately seventy departments. Some are geographical, such as South American or Western Europe, and some are functional, such as the protocol department. These departments are similar to the bureaus at the U.S. State Department. Each has its own legal adviser, to whom it turns when in need of legal advice. With only twenty advisers, then, each lawyer is necessarily attached to more than one department. Some departments are also split for purposes of legal advice. The South American department, for instance, includes Antarctica, but Antarctica raises certain problems³⁴ which fall under the purview of other departments.

Under the British system, each department has the responsibility of deciding whether to take international legal problems to that department's legal adviser. Guidelines demand that certain problems, such as international claims, must be taken for review. The depart-

31. See Ronald St. John Macdonald, *The Role of the Legal Adviser of Ministries of Foreign Affairs*, 156 RECUEIL DES COURS D'ACADÉMIE DE DROIT INTERNATIONALE [hereafter R.C.A.D.I.] 377, 451 (1977-III).

32. The United Kingdom takes the somewhat exceptional step of posting the rest of its legal advisers abroad.

33. The British LAs are recruited by competition organized by the Civil Service Commission. Rarely are more than one or two hired at once, because given the small size of the permanent staff, a greater number of new staffers is neither necessary nor manageable. Successful recruits occasionally come from private practice, from public international organizations, or from university teaching staffs; thus a mix of practical and academic experience exists among the ranks. Upon joining the service, the new recruits become full time legal advisers. If posted abroad, they are sent as LAs and not as career diplomats. Only rarely does an LA transfer to the main diplomatic service.

34. The special issues surrounding Antarctica go beyond its remote geography. For instance, Antarctic policy is tempered by claims of sovereignty, the implementation of The Antarctic Treaty (Dec. 1, 1959, 12 U.S.T. 794, 402 U.N.T.S. 71), and the application of the U.N. Third Conference on the Law of the Sea, 11th Sess., U.N.Doc. A/Conf.62/122 (1982) [hereinafter 1982 Convention on the Law of the Sea].

ment, however, usually uses its discretion. In practice, opinions are sought more often than might be strictly necessary. Department heads' training and experience provides them with a healthy respect for matters of law. Accountability is built into the system; department heads know their work will be questioned further along in the chain of command if the consequences of their proposals are unclear. The chief LA ranks as a department head and attends the daily meetings of all the department heads.³⁵

In Switzerland, the LA's office is divided by function. One section, headed by an ambassador with the title of "Director of the Foreign Department's Office for Legal Affairs," assumes the responsibility of overseeing regular issues that arise daily. In addition to the LA, a leading academic, known as a "jurisconsult" or "legal counselor," also assumes a trouble-shooting role within the ministry and is also charged with planning and outlining the international legal policy of the State. The Swiss LA we interviewed believes that such an organizational structure allows his country to develop general principled positions on significant long-range issues without sacrificing practicality and efficiency. The Swiss LA plays a significant role in the policy-making process by meeting with the foreign minister and other department heads the day before the weekly Swiss cabinet meetings. Of course, this enhanced role is facilitated by the size of the Swiss Foreign Department and the fact that Switzerland is a neutral State. The fact that Switzerland is not a member of the United Nations might also aid in this enhanced role—perhaps there are fewer multilateral matters to discuss.

Not all LAs are as fortunate to be so integrated into the policy-making process. Countries with small legal staffs often relegate them to more purely bureaucratic roles. But even in those countries some notion of law's importance often remains. In Hungary, for instance, the LA sits on the ministry's crisis staff, and is immediately notified when an urgent situation exists.

Other patterns exist elsewhere for reasons of expediency and philosophy. In the Netherlands, for example, the adviser's office exists side-by-side with other specialized legal units, such as the treaties department, and several legal affairs sections with varying responsibilities. The lawyers in those departments may consult with the LA, but the LA's office itself does not oversee the entire ministry's legal busi-

35. See Arthur D. Watts, *International Law and International Relations: United Kingdom Practice*, 2 EUR. J. INT'L L. 157 (1991).

ness like the LA's office does in the United Kingdom and the United States.

In other countries too—Hungary, Ireland, and Italy—the LA assumes the role of a generalist and is unable to systematically oversee the entire foreign affairs operation because of staffing limitations. In these countries, unlike such countries as the United States, the United Kingdom, France, and Bulgaria, the LA normally lacks independent access to the ministry's cable traffic—cables sent to the ministry by the country's embassies and permanent missions to international organizations—and must rely wholly on referrals.³⁶ An Hungarian LA said that while this might weaken his position, it was also inevitable, because the task of sorting through that information would overwhelm his office. His fears may be well founded. A former French LA claimed to have spent two hours each day sifting through cables to find legal issues. Countries with smaller legal staffs, such as Ireland and Italy, are also more likely than other countries to ask outside lawyers for advice; the lawyers consulted may be either practicing attorneys or academics.

The mechanics of a given country's bureaucracy also play a role in whether international law is included in policy formulation. In some countries, lawyers face tremendous obstacles in independently raising unsolicited legal considerations, or in pursuing the implementation of recommendations they have given.

Be that as it may, it should be noted that in all of the countries we surveyed, the possible input of international law primarily takes place at the bureaucratic level rather than at the cabinet or other policy-making level. Admittedly, the national constitutions of some countries—such as Ireland, the Netherlands, and Italy³⁷—refer, explicitly or implicitly, to the recognition of international legal principles as a broad policy goal, thereby requiring policymakers to take account of the major guidelines on foreign policy deriving from international law. Nevertheless, even in these countries bureaucratic input sometimes proves necessary in the consideration of legal matters, such as when a treaty or other international obligation directly conflicts with a stated national interest. In these cases, the pressure to renounce or evade that obligation becomes formidable, and policymakers prefer to turn to legal advisers to get some sort of support for their attempt to circumvent international legal rules.

36. In Italy's case, however, the Office of the LA receives some general cables directly, in addition to receiving cables and dispatches sifted through a central office in Rome.

37. IR. CONST. art. 29, § 3; GRONDWET [Constitution of the Kingdom] [GRW. NED.] art. 90 (Neth.); COSTITUZIONE [Constitution] [COST.] art. 10 (Italy).

C. Other Factors Influencing the Legal Advisers' Ability to Participate in Foreign Policy

In addition to the structural considerations, our interviews established that a number of factors must be considered in evaluating the impact of LAs' advice on foreign policy: (a) the manner and frequency with which the LA can offer his advice to policy-makers; (b) the LA's individual personality; (c) the LA's training and background; (d) the amount of experience the LA has had with an issue as compared with the experience of the diplomats involved; and (e) constraints limiting the LA's role.

It is important to note that availability of advice is directly related to the availability of a convenient forum to communicate advice. In the United States, the United Kingdom, France, Switzerland, and Bulgaria, the LA is able to offer advice through his participation in regular staff meetings, whereas his counterparts in other countries, such as Italy, lack the opportunity to express opinions due to the infrequency and irregularity of those meetings.

Institutional structures that give LAs access to regular staff meetings also enable them to translate their experience into personal authority. One of our British interviewees compared the role of the LA with that of a traditional "family solicitor," in that the LA assumes the authority to discuss a wide range of issues in a variety of contexts without limiting himself to legal matters. Thus, institutional authority in the U.K. system is often less important than personal authority, and the advice given by an LA acting under the latter may not be strictly legal in nature. Because, under normal circumstances, the British LA must wait for the department head to ask advice on any given matter—which may not even occur—the lawyer must always be willing to press his views when the opportunity arises. Conversely, one of our U.S. interviewees mentioned the U.S. style of open, freewheeling meetings, where the lawyer can express his views on whatever topic is being discussed by the regional or functional bureau that he serves.

The importance of a given LA's interpersonal skills varies from country to country, often according to the differing amount of access to higher authority that LAs enjoy in different countries. Under the U.S. model, the force of the LA's personality can win the confidence of the secretary of state and circumvent the usual chain of command to gain access to a key decisionmaker.³⁸ Both the British and American LAs must use their charisma to diminish their superiors' and col-

38. It should be noted that in the United States, the LA is appointed by the president and is likely to be in the confidence of the secretary of state, who is also a presidential appointee.

leagues' resistance to seeking legal opinions. As one former American LA noted: "Whether you are invited to the Ball, so to speak, is very important." He explained that the more one is seen with one's secretary of state, the more one is likely to be "included in the Ball." However invitations are limited: the "Cinderellas" are in the regional departments, such as Europe and Africa, while the ugly stepsisters come from the functional departments, such as economic affairs, ocean, environment, and so forth. "And if you're the lawyer," he said, "of course you tend to be the ugliest [step]sister of all because you are the lawyer."

Education and background can also play a pivotal role in the effectiveness of an LA. In France, for example, university professors always occupied the position of LA until World War II. Since then, "administrative judges" have been preferred for the post; the last two have been members of the *Conseil d'Etat*. Other members of the LA's staff are diplomats, except for the Deputy LA who comes from the judiciary. It is noteworthy that the top position is reserved for judges, who are perhaps more likely to respect and follow law than diplomats. Furthermore, the composition of political organs may determine the LAs' influence. The number of lawyers in the cabinet itself, as well as throughout the government, may affect the reception given to legal advice.

The considerable length of an LA's involvement in some matters also makes the role unique: LAs often have the benefit of serving in the same position for many years, while diplomatic personnel are reassigned more frequently. As a result, LAs are often better informed about a particular issue than those in the department who are responsible for it. In the United Kingdom, for instance, the same two departmental LAs dealt with Rhodesia³⁹ between 1964 and 1972, while three heads of one department, and four of the other served during the same period. As other staff members pursue careers as diplomats, moving from department to department and from country to country, these "action officers," as they are known in the United States, are inevitably less experienced in several fields than even junior LAs. The desire to get credit and promotion can lead to an unconscious, or even conscious, rivalry between diplomats and LAs. Lawyers' participation in meetings sometimes leads to translating the issue into legal jargon, thus allowing the lawyers to outshine the diplomatic staff and steal the show. Thus, policymakers in fields such as arms-control negotiation

39. For a discussion of the United Kingdom's policies toward Rhodesia, see PRIME MINISTER'S DEPT., *RELATIONS BETWEEN THE RHODESIA GOVERNMENT AND THE UNITED KINGDOM GOVERNMENT* (1966).

have complained that the lawyers have taken over. Not only is this perceived as legal grandstanding, but some policymakers also worry that the lawyers' penchant for clinching deals and contracts might cause them to overlook some of the concessions they make.

The institutional strength of the LA is mixed. A British LA emphasized that an LA may find little use for institutional authority perceived as rooted in a previous administration or as reluctant to incorporate new approaches to legal problems. Other department officials may attempt to exclude legal advisers from policy formulation and revision if the LA's office is perceived as firmly entrenched in the bureaucracy and unable to offer much more than almost uniformly conservative opinions. The LA pointed out that the department must be especially careful "when traditional advice [becomes worn out] around the edges."

The ability to offer advice carries distinct advantages over having to wait for it to be requested, as the nature of the requests themselves may constitute constraints on the lawyers in various ways. First, because foreign affairs are part of the political process, many decisions are made in light of political motivations and other pressures, and the LA is neither authorized nor qualified to reach such decisions in the political arena. Obviously, when the prime minister or president formulates a policy which even the foreign minister or secretary of state must accept as a *fait accompli*, the LA is powerless to influence it in any way. Even when the initiative for a new policy comes exclusively from the foreign minister, political expediency often may exclude the LA from its formulation. However, such policies could create new opportunities for LAs if they were asked to help apply and interpret the policies, even if they were not consulted in determining their content.

Many situations in international affairs require quick decision-making at a high level, and the LA's input in such situations is necessarily diminished. Although the LA's advice on possible courses of action may actually be sought in such cases, an LA generally is unable to offer a detailed legal analysis in such situations due to time constraints. Instead, the LA will offer advice more cautionary than legal, based on the adviser's knowledge of similar situations. In such cases, the previously mentioned melding of personal and institutional authority is more likely to result in confusion caused by disparate opinions than in effective collaboration between departments.

Generalizations on the extent to which the LA's advice is heeded can be dangerous. Thus, there are cases in which the LA, the ministry, and the head of the executive branch must deal with actions under

fire—both literally and figuratively—by officers in the field. When decisions are made in distant locations by people outside of the supervision of the LA's office, there is obviously little superiors can do to influence them. The LA prepares for such situations in advance by providing field officers with a set of guidelines on which they may rely. Rules of engagement during wartime are the most common, and perhaps the most important, example of such contingency planning, as noted by a British LA in reference to the United States' attacks on Libyan aircraft in the Mediterranean Sea⁴⁰—an action taken in the field, but envisioned years earlier around a conference table.

II. THE ROLE OF INTERNATIONAL LAW

A. *Legal Characteristics Promoting Compliance*

According to most LAs, it is difficult to breach clear, fundamental, and prohibitive rules, even in extreme and unusual situations. For instance, when the U.S. government was considering potential resolutions to the Cuban Missile Crisis,⁴¹ the wholesale destruction of the island was ruled out as not only a violation of international law but also contrary to commonly held notions of morality. This is not to suggest that mere legality renders a particular course of action moral. Far more often, legal arguments weigh heavily not on the side of morality, but rather on the side of prudence. Thus, it would have been imprudent in that situation — to say the least — for the United States to have reacted with unparalleled force to an unknown threat.

Legal judgments can result from an emphasis on prudence, often at the expense of morally sound solutions. For instance, countries are far less likely to protest the *violation* of international law by a superpower than by a smaller country over which they exert some degree of authority. A country is unlikely to oppose the human rights practices of another country when it knows its efforts will not serve to remedy the abuses and may in fact aggravate an existing situation, as in the case of the Swiss refusal to sanction South Africa over that nation's apartheid policies.⁴²

The presence of legal analysis in a political issue serves to diminish

40. See generally, Blum, *supra* note 10 (discussing the origins and background of the U.S.-Libya dispute regarding the Gulf of Sidra).

41. See CHAYES, *supra* note 2.

42. According to our interviewees, Switzerland has long refused to follow any of the sanctions recommended or imposed by the United Nations regarding South Africa. See generally, COMMONWEALTH COMMITTEE OF FOREIGN MINISTERS ON SOUTHERN AFRICA, SOUTH AFRICA: THE SANCTIONS REPORT 44, 75, 78 (1989) (mentioning Switzerland's trade practices with South Africa during the 1980s).

the intensity of debate at all levels and discourages countries from reacting to political crises in a violent and ineffective manner. It is unclear whether law or prudence more strongly influences the tendency toward moderation in the resolution of international conflict, but the two are inevitably connected. When prudence is argued, it is always advocated in legal terms, often by lawyers themselves. It hardly matters whether law is prudence disguised or prudence incarnated; it is used as the guarantor of prudence, and is accepted as such.

The need to maintain consistency and to avoid retaliation—objectives touted by lawyers and diplomats as central to their respective missions—further encourages moderation. First, both lawyers and diplomats strive to ensure a consistent approach toward international issues by their governments. The French LA emphasized that promoting consistency was one of his major tasks and implied that it is a role for which lawyers are uniquely suited. International law provides objective guidelines against which individual countries can measure the success of their responses to various crises and thereby ensure that their responses are foreseeable to others. Second, States fear retaliation or reprisals in future dealings with other States if they fail to adhere to international guidelines. In other words, States fear the *tu quoque*, or reciprocity, principle. Every time a State elects to ignore or reinterpret an existing international standard according to its own interests, it runs the risk of being unable to invoke the rule in the future, and indeed, if a State acquires a long-term reputation of non-compliance, it may forfeit the protection of international law entirely.

The clarity with which a given international legal standard has been articulated also will affect the degree to which that standard influences the LA's foreign policy advice. LAs repeatedly stressed that whether or not law can play a role as a guiding factor in foreign policymaking turns on whether the legal standards are clear and undisputed, or are instead vague and lacking in authority. As one Deputy LA put it, the factors that LAs usually take into account when giving advice include: the extent to which the relevant rules of international law are clear and well-established; the extent to which international law is reflected in domestic law; and the extent to which national interests are affected.

International law's significance is thus diminished by its fluidity and tenuous binding authority. Various LAs, including the Hungarian LA we interviewed, pointed out that customary law is more likely to be regarded with suspicion than treaty law because customary law is unwritten. By contrast, the law can play a pivotal role in a

government's decision when it is clear and serves to advance the government's position.

Despite these generalities, however, many LAs pointed out that one cannot make a sweeping appraisal of international law by gauging the extent to which policymakers abide by it. In their view, a distinction should be drawn between various segments of international law, some of which lend themselves more easily to government compliance. These LAs emphasized that while States tend to respect both organizational legal standards—rules governing international organizations or international procedures, for example—and rules based on reciprocity, States are much less likely to live up to international norms based on other mechanisms. It is therefore appropriate to dwell briefly on these various categories of international legal standards.

1. International Law as a Framework

Many LAs insisted that international law exists primarily to preserve institutional frameworks that have developed over time and have been adopted voluntarily by States. Such frameworks can be based either on matters of custom, such as the rules of war or diplomacy, or exclusively on treaties, such as those authorizing international organizations. Most States greatly respect the institutional structure found in international law, and small States in particular rely tremendously on the predictability and safeguards it provides. Of the countries in our survey, Ireland, Italy, and Switzerland placed the most emphasis on the value of general standards and safeguards. Switzerland, in fact, acknowledges its special relationship with customary international law, which provides the basis for its status as a permanently neutral country. Like all small States, Switzerland also relies on the framework of international regulations to safeguard its economic relations with other States and to provide most of the limited influence it possesses in dealing with larger States. All States carefully consider the advantages and disadvantages of regularization and conformity, but small States generally have little flexibility in deciding whether to conform to international legal standards because of their relative lack of power.

Larger States, whether they are superpowers or countries with other extraterritorial concerns,⁴³ tend to regard their commitments under general rules of international law more as a matter of policy than of necessity.⁴⁴ However, larger States may fear that ignoring in-

43. The United Kingdom is one example.

44. For an example of the role of international law in U.S. jurisprudence, see *United States v.*

ternational guidelines in a particular instance may cause other countries to treat them in the same arbitrary fashion in future dealings. By and large, the application of such cost-benefit analyses almost universally results in States honoring their obligations in the face of minor and often disagreeable consequences.

According to most LAs, international law's function as a framework for peaceful cooperation is simply too important to ignore. However, it should not be forgotten that the authority accorded to a particular set of legal standards is directly related to the importance and utility of the legal subject to which the laws apply.

2. Reciprocity as a Guarantor of International Law

All of the LAs interviewed stressed that in many areas governed by international legal standards, States rely on the reciprocity principle to ensure compliance. For example, a particular country enacted legislation forbidding the spouses of embassy employees posted in the country to work. The United States responded by revoking the privilege for spouses of that country's embassy employees in the United States. The country subsequently bowed to pressure from its embassy employees and changed its laws.

In such instances, reciprocity is a valuable tool applied by States to ensure compliance with international law and to bring about changes which are perceived to be essential. In a more general sense, States are cognizant of the fact that they must treat other countries fairly to ensure similar treatment for themselves.

3. Law Outside of the Reciprocity Principle: The Protection of Human Rights

LAs from such countries as the United States, France, Italy, and the United Kingdom emphasized that their government authorities would not even consider mistreating a foreign national in retaliation for similar treatment of one of their own citizens.⁴⁵ However, while the goal of protecting human rights is universally recognized, few States are willing to commit themselves in actual practice to guaranteeing humane treatment outside their national borders. Small States, in particular, are reluctant to protest against human rights abuses by other countries. LAs from Ireland and Hungary, for instance, noted that they rarely encourage their governments to oppose such viola-

Alvarez-Machain, 112 S. Ct. 2188, 2194-96, 2200-05 (1992) (Rehnquist, C.J. for the majority; Stevens, J., dissenting).

45. Of course, the same attitude can be expected from most countries.

tions because doing so would be politically imprudent. A former Dutch LA said that the Foreign Minister would be "highly astounded" if an LA were to bring human rights violations abroad to his attention. LAs from the United States and the United Kingdom suggested that a foreign policy initiative on human rights formulated by their offices would be taken more seriously if it were issued in the form of an opinion regarding countries' legal obligations in the area of human rights. For example, lawyers will bring to the attention of their governments the fact that failure to react in some way to human rights violations by another country could imply that they condone the action or deem it permissible under international law. When particular events compel countries to protest, they generally do so directly to the government involved through diplomatic channels rather than through the public arena. This mechanism is used in order to preserve an image of international cooperation.

States may also use international law to justify their silence in the face of human rights violations. Switzerland, for instance, has long refused to impose sanctions against South Africa for that country's policy of apartheid, and has relied on its status as a permanently neutral State to defend its "acceptance" of South African policy.⁴⁶

B. *Legal Advisers' Contributions to International Law's Evolution*

In addition to advising policymakers to conform with international law, LAs frequently play leading roles in promoting the evolution of international law in the direction they consider best suited to national interests. For instance, it was the French LA who decided at the 1969 Vienna Conference on the Law of Treaties that France should oppose the new concept of "*jus cogens*" on account of its vagueness and the "dangerous" implications it would therefore have.⁴⁷ France's withdrawal of its acceptance of the compulsory jurisdiction of the Interna-

46. See *supra* note 42 and the accompanying text.

47. For a discussion of the concept of *jus cogens*, see Eduardo Jiménez de Aréchaga, *International Law in the Past Third of a Century*, 159 R.C.A.D.I. 9, 63-67 (1978-I).

The international community recognizes certain principles which safeguard values of vital importance for humanity and correspond to fundamental moral principles: [T]hese principles are of concern to all States and "protect interests which are not limited to a particular State or group of States, but belong to the community as a whole[.]" They include the prohibition of the use or threat of force and of aggression, the prevention and repression of genocide, piracy, slave-trade, racial discrimination, terrorism or the taking of hostages. The observance of these principles, firmly rooted in the legal conviction of the community of States, is required from all members of that community and their violation by any State is resented by all.

Id. at 64-65 (footnote omitted).

tional Court of Justice,⁴⁸ occasioned by that Court's decision in *Nuclear Tests (Australia v. France)*,⁴⁹ also came at the suggestion of the LA. Similarly, some members of the U.S. Office of the Legal Adviser stated that it would be in the United States' interest to promote international law's acceptance of the use of force to combat terrorism, as well as some changes in the 1982 Convention on the Law of the Sea,⁵⁰ so that the United States would not later need to object that those practices went beyond current legal standards.

American LAs have taken the lead in promoting the evolution in international norms along these lines. An American LA pointed out that in the development of international law, LAs in the United States look to the cases they have solved and then extrapolate principles from them, while Europeans tend to accept a principle and then work backward. This difference in approaches to problem-solving—probably connected to different legal perceptions stemming from common-law and civil law traditions—can, in the opinion of one LA, be discerned by examining the differences in U.S. and European attitudes toward the “common heritage of mankind” principle.⁵¹ To the United States, the “common heritage of mankind” notion is too loose and general to be workable; its lack of specificity renders the concept legally inoperable. By contrast, most European nations regard the “common heritage of mankind” as a general guideline subject to further legal developments. In other words, European officials believe the concept can provide at least a very broad behavior standard appropriate for implementation through legal rules designed to make it workable in interstate relations.

III. INTERNATIONAL LAW'S POTENTIAL IMPACT ON FOREIGN POLICY

Before moving on to consider whether there are means available

48. Edward McWhinney, *International Law-Making and the Judicial Process: The World Court and the French Nuclear Tests Case*, 3 SYRACUSE J. INT'L L. & COM. 9, 43 (1975).

49. 1974 I.C.J. 253 (Dec. 20, 1974).

50. 1982 Convention on the Law of the Sea, *supra* note 34.

51. The “common heritage of mankind” principle outlines a non-traditional manner for distributing wealth in the international community. Traditionally, assets such as territory could either be appropriated by sovereign states, subject to certain conditions, or were available for the use by all states *qua res communis omnium*, things common to everyone. The principle of *res communis omnium* was applied, for example, to the high seas with the consequences that rich countries were able to draw greater benefits from the seas. With the introduction of the “common heritage of mankind,” resources from the sea-bed, ocean floor, and subsoil are beyond the limits of national jurisdiction. Instead, such resources, as well as those from the moon, the sun, and other celestial bodies “are vested in mankind as a whole.” See ANTONIO CASSESE, *INTERNATIONAL LAW IN A DIVIDED WORLD* 376-92 (1986).

for enhancing States' compliance with international legal standards, it may be useful to briefly summarize the main results of our inquiry.

• None of the officials interviewed admitted to ever deciding or suggesting blatant breaches of international law, although one former attorney general conceded that because of crucial national interests, his country had run up against international law in such areas as extradition, the continental shelf, and fishing rights. To be sure, the interviewees' pro-international law stance is attributable to some extent to their desire to avoid criticism over possible failures to fulfill their national duties as law-abiding officials. Furthermore, States tend to avoid openly admitting they have breached international law, preferring instead to cloak their transgressions "in the false colors of existing right," a tendency aptly discussed by Professor Mendelson.⁵²

Still, the general tendency of States to abide by international legal standards may be rooted in the fact that many politicians perceive international law as a body of guidelines intended for the most part to protect the interests of all States. As a former foreign minister noted in an interview, "International law is a distillation of things that civilized nations have agreed should be the basis of common action."

• Predictably, policymakers from small countries routinely professed the greatest respect for international law, whereas those from larger countries appeared inclined to question its value in some areas. On the other hand, many small or medium-sized countries do not rely on lawyers when decisions are made in foreign affairs, while most large countries tend to effectively integrate legal staffs into their foreign ministries. This apparent paradox can be explained by two facts: (a) the

52. See Maurice H. Mendelson, *Practice, Propaganda and Principle in International Law*, in CURRENT LEGAL PROBLEMS 1989 at 8-9 (1990). Among the possible reasons for this tendency, he cites:

First, on the domestic plane the state and its legal system are in a sense, as Kelsen has said, synonymous; and certainly the legitimacy and authority of the government depends (at least in part) on its obeying its own law; this being so, it is not a very attractive posture for it openly to admit to delinquency on the international plane. *Secondly*, governments often need domestic political support for their international activities and adventures; to admit that you are engaged in aggression, for instance, is likely to arouse less enthusiasm amongst the populace than claiming you are going to war to defend the motherland. *Thirdly*, if the other government is minded to accept your claim, whether because it recognises the need for a new rule (as with the acceptance of the Truman proclamation on the continental shelf) or because it succumbs to political, economic or even military pressure, it will find it more face-saving, and therefore easier, to acquiesce in something which is being presented as an existing right, rather than a novel demand. A connected point is that, if you can present your demand as an existing right, it is the other government who would ostensibly be disturbing the status quo by denying it, and not you by making the demand. *Finally*, there is always the possibility that, even if the other state's government is not taken in by your claim, influential groups within that state or in politically significant third states, will be persuaded. In other words, legal argument can be deployed as a form of propaganda. It is certainly cheaper than war: to adapt La Rochefoucauld's maxim, hypocrisy is an *inexpensive* tribute which vice pays to virtue.

Id. (footnote omitted) (emphasis original).

ultimate decision to apply or disregard international law is normally made at the policy level while, as noted previously, lawyers primarily operate at the bureaucratic level, and the participation of lawyers in the decision-making process in large countries stops short of the last echelons where policy issues are ultimately decided; and (b) policy-makers in small and medium-sized countries favor following international law as much as possible, because this approach tends to protect their interests, ensure their credibility, and avoid reciprocal violations of international law by other states. Thus, it can be said that the amount of recognition granted to a country's LA bears little relation to whether that country perceives the value of international law.

- Most LAs, whether from large or small countries, conceded—as an abstract eventuality—that in conflicts between paramount national interests and international legal standards, the former are likely to prevail.

- Furthermore, some of them admitted that in areas where international law is unclear or open to differing interpretations, States naturally prefer the interpretation more consonant with national interests.

- Some LAs argued that whenever they were consulted at an early stage of the decision-making process and had a chance to offer a choice between various alternatives, they always advocated the alternative leading to compliance with international law.⁵³

- At least one former foreign minister argued at great length that in spite of his lack of international legal background and his tendency to avoid consulting with his LAs, he always had made *de facto* decisions conforming to international legal standards. He attributed this primarily to the fact that he had tried to draw inspiration from his national constitution, which upholds international law and even promotes its respect. The foreign minister also contended that his decisions had been based on common sense and restraint—values which, on reflection, he thought were enshrined in international law.

So much for the principal results of our interviews. This general picture may seem too rosy. One should not forget that most interviewees expressly or implicitly admitted that there is an “institutional” possibility that international law will be breached despite contrary advice from the LA. This is possible for two reasons. First, LAs are not always consulted by policymakers at an early stage of the decision-making process, and in some cases are not consulted at all. It follows that the existence of the LA's office does not by itself bar deliberate

53. This proposition, again, should be taken with a pinch of salt, in view of the interviewees' personal and professional status.

violations of international legal standards. Second, after politicians have made their decisions with or without LA input, when the LA is later requested to step in, his action normally will not lead to a repeal of the wrong decision, even if he feels the decision was made contrary to international law. This is because LAs feel that they should act as "advocates" of the State once a decision is made. As a consequence, at this stage LAs will uphold and defend the decision made by policy-makers, even if it is at odds with international law.

Hence, even if no former foreign minister or former or present LA has admitted to breaching international legal standards, the fact remains that the institutional conditions exist in every country for breaches of international law to occur, whatever the advice, if any, of the LAs.

IV. STRENGTHENING THE ROLE OF INTERNATIONAL LAW IN FOREIGN POLICY DECISIONS

It would be obvious to suggest that if countries would only pay more attention to their lawyers the role of international law would be strengthened. Such a solution is too simplistic. Our inquiry has implied that the relationship between the role of lawyers and the law which the governments espouse is somewhat tenuous at best—at least in some highly sensitive areas of foreign policy.

I would submit there are two main approaches to increasing the impact of international legal standards on foreign policymaking. First, legal standards could be strengthened to better ensure compliance. This is a long-term objective, to be pursued jointly by more than one State. Second, each State could better integrate its legal staff into the decision-making process, a short-term objective to be pursued by States individually. This second approach could enhance the impact of international law on foreign policy, except for areas where other considerations—military, economic, or political—take precedence in the eyes of policymakers.

A. *Improving International Law to Ensure Compliance*

1. Strengthening the Role of International Regional Organizations

One of the best means of promoting respect for international norms involves expanding the number of regional and interregional compacts as well as enhancing the role of those that already exist. Many LAs reported that action in conformity with international legal standards was brought about by the need to take account of regional or interregional organizations and their pronouncements.

The European Community (EC) is often considered a prime example of a successful regional organization. European lawyers participating in our study highlighted the fact that the EC provided not only cohesion among Member States, but also a double layer of international law, thereby making it more difficult for States to ignore EC dictates. But the fact that EC law is directly binding on national authorities and is carried out by specific institutional enforcement mechanisms distinguishes it from other types of international law. In fact, LAs play an increasingly *less* significant role in its implementation as EC law becomes directly applicable to the relevant ministries. Similar organizations would not be feasible in many geographic areas because of a lack of resources required for the successful functioning of a multinational organization—as in the Andean Common Market—and because of the political unwillingness of the States concerned to enter into such a closely integrated association.

Other existing regional schemes may provide more realistic models. For instance, the Conference on Security and Cooperation in Europe (CSCE), an interregional organization embracing European countries as well as the United States and Canada, has been successful in guiding its thirty-five members without actually formalizing legally binding standards of conduct. An Irish official with whom we spoke credited the CSCE's policies in the area of human rights with encouraging his country to protest internal political events in Poland, which is also a member of the Conference. The official also pointed out that Ireland failed to oppose various U.S. actions in Central America because the latter is not considered part of Ireland's proper sphere of concern.

According to a number of LAs, international lawyers should welcome the addition of regional organizations to the international legal community, because such organizations promote long-term security and progress by providing Member States with nonintrusive means of mutual influence, as well as offer an opportunity for States to bind themselves under standards too specific for broader agreements.

2. Enhancing the Role of the Reciprocity Principle

A French LA with whom we spoke emphasized that increased reciprocal relations are necessary for international law to prosper. He also predicted that law will play an increasingly important role in technical fields such as transportation and aviation, as well as in fishing, navigation, commerce, and diplomatic relations.

In contrast, it was possible to discern among LAs widespread skepticism toward the prospect of community-oriented legal standards ac-

quiring more weight and greater impact on international relations. However, a number of LAs concluded that values transcending reciprocal State interests are likely to be implemented within the regional or interregional organizations referred to previously. In such cases, the existence of multilateral tribunals and the possibility of airing community values may help these values play a stronger role in interstate dealings.

3. Clarifying International Legal Standards

Many of the LAs and former policymakers we interviewed agreed that the vagueness of international law provided States with a lot of latitude in decisionmaking. One of the best ways to enhance strict compliance with international law would be to reduce the maneuvering room from which States currently benefit.

This, however, is a long-term task primarily for international courts. They are no doubt the entities best suited for clarifying and determining the exact content of loose legal rules. But States could further the implementation of this objective by drafting clear legal standards into *future* treaties.

4. Making Compliance With International Law Compulsory Under Municipal Law

I have mentioned above that a few national constitutions require policymakers to respect fundamental principles of international law.⁵⁴ In these cases foreign ministers and other national policymakers are duty-bound under domestic law to live up to international legal standards. Thus, in these countries, international law carries more weight. As a former American LA indicated, the legal view prevailing in the United States is that the president cannot breach its international *treaty* obligations because they are incorporated into "the supreme Law of the Land"⁵⁵ by the U.S. Constitution. "[T]he supreme Law of the Land," however, does not encompass *customary* international law. Thus, while a decision to ignore customary international law could entangle the United States in the international sphere, it would not transgress the U.S. Constitution.

Whatever the value of this view, it is beyond dispute that imposing respect for international law at a domestic level would greatly enhance compliance with such standards. A case in point is the area covered in

54. See *supra* note 37 and the accompanying text.

55. U.S. CONST. art. VI, § 2, cl. 2.

the United States by the War Powers Resolution,⁵⁶ which outlines procedures for involving U.S. troops in international hostilities. Because the resolution lays a domestic legal framework over foreign policy decisions made by the president, one LA told us that officials in the executive branch normally consult the State Department legal adviser to determine whether proposed international actions will invoke the War Powers Resolution.⁵⁷

It would therefore prove important for national constitutions or federal statutes to incorporate, if not a general duty for State agencies to comply with international law, at least the duty to abide by the most fundamental principles of that body of law. Those bound by such a duty would of course include policymakers in the foreign ministries.

B. Augmenting the Legal Advisers' Role in Formulating Foreign Policy

If multilateral and regional organizations continue to grow in stature and authority—as they must if international law is to increase in importance—foreign ministries must expect to deal with a proportionately larger amount of work. This growth of legal institutions would benefit countries, such as the United Kingdom and the United States, that grant lawyers considerable flexibility in defining their duties. At the same time, however, countries such as Ireland, Italy, and Hungary may be faced with unanticipated diplomatic difficulties due to the insufficient legal staffing of their foreign ministries.

Based on the information gathered from the interviews as well as a survey of the existing legal literature on the LAs' varied roles,⁵⁸ I am proposing the following suggestions to improve the role of LAs and to further States' compliance with international legal standards. These suggestions are subject, of course, to the above caveat regarding the

56. 50 U.S.C. §§ 1541-1548 (1988).

57. For insight on the LA's role in advising U.S. officials on War Powers Resolution procedures, see Letter from James R. Schlesinger, Secretary of Defense, to Henry A. Kissinger, Secretary of State (Sept. 21, 1974) (copy on file with the *Michigan Journal of International Law*); Memorandum of Legal Review of Deployment Orders from the General Counsel of the Dept. of Defense to the Secretary and Deputy Secretary of Defense (Dec. 1984) (copy on file with the *Michigan Journal of International Law*); Memorandum on War Powers Resolution from Martin R. Hoffman to Major General John A. Wickham Jr. (July 8, 1974) (copy on file with the *Michigan Journal of International Law*); Letter from Linwood Holton, Assistant Secretary for Congressional Relations, to Sen. Thomas Eagleton, United States Senate (May 10, 1974) (copy on file with the *Michigan Journal of International Law*); Letter from Henry A. Kissinger, Secretary of State, to James R. Schlesinger, Secretary of Defense (Sept. 7, 1974) (copy on file with the *Michigan Journal of International Law*).

58. See, e.g., Ronald St. John Macdonald, *supra* note 31, at 377 and the works cited at 476.

problematic relationship between LAs and States' respect for international law.

1. Selecting Legal Advisers From the Private Sector

It is widely believed that LAs should be as independent as possible from the authority of policymakers, to afford them the independence to disagree and, if necessary, to distance themselves from foreign policy decisions that appear contrary to international law. Under this approach, one would select LAs from the ranks of academics or practicing attorneys, as is done in Italy, the United States, and France. This theory maintains that if LAs are selected from the ranks of career diplomats and government bureaucrats, they are less likely to argue aggressively for strict compliance with international law because they come from within the system. Thus, diplomats-turned-LAs might be less likely than outside candidates to challenge authority over improper decisions or to insist upon early input into the decision-making processes.

A comment made by several LAs supports this contention. They spoke of the drawbacks created by filling the legal adviser's post with a civil servant whose whole career, by definition, is tied to continued ministry employment, and who may therefore be reluctant to rock the boat. In contrast, LAs who come to the office from the university, bench, or private bar could be expected to have greater independence because the consequences of offering unpopular advice would be less serious: if things didn't work out, they could simply return to academics or private practice. In fact, such independence might even enhance their reputations in the private sector, where solid legal skills are respected more than political kowtowing.⁵⁹ Thus, selection methods that promote professional independence are essential for ensuring that policymakers are provided with sound, objective legal advice.

Whether LAs should be political appointees rather than "neutral" academics or practitioners is still under debate. Political appointments are apparently not well regarded in Europe because non-political appointees are considered to be more impartial and less susceptible to influence by politicians. On the other hand, political appointments are considered quite appropriate for the U.S. system. According to a number of current American LAs and one former LA, filling a political appointment has its advantages: (a) the appointee has greater equality with the policymakers; (b) political appointees gener-

59. This point was stressed by the LAs from France, Israel, and the United States, and was alluded to by advisers from several other countries.

ally come from the same social set as policymakers and are considered to be their social equals; (c) unlike the career civil servant who must appease his superiors to keep his job, the political appointee knows that might not have a job in the next administration and therefore enjoys more autonomy; (d) because political appointees normally move out of the State Department into private practice, the incentive is strong to maintain an untarnished reputation; and (e) political appointees are more likely to be attuned to the political pressures of foreign policy. Because few international law problems have black and white solutions, the LA's office needs to be sensitive to political concerns so that it can offer advice that the policymakers will be less likely to reject.

2. Restructuring the Legal Advisers' Office

The Swiss method of dividing its offices according to functions—long-range planning versus daily affairs—could prove useful by increasing the amount of LAs' work without losing sight of broad general issues. Such a division of labor would require that one chief lawyer deal with routine daily matters—from top concerns to minor issues—while the other concentrates on long-term policy planning and other issues of general importance.

A drawback to this approach, however, is that many countries would need to hire several more lawyers before they could follow either the Swiss or the U.S. structure, or some combination of both. But such a move would be worthwhile. Nations such as Ireland, Italy, Hungary, Bulgaria, Israel, and Brazil must increase the number of lawyers working in their ministries if the law is to play an enhanced role in policy formulation. Furthermore, departments must ensure that their lawyers are well-trained and receive adequate administrative support. Although every interviewee in our research insisted that lawyers in their departments were well-educated, they admitted that their lawyers' effectiveness was nevertheless hindered by insufficient staffing and support, particularly in smaller countries.

An organizational structure similar to that of the United States where LAs serve in specific ministerial departments is the best means of integrating the LAs' duties with those of the other departments. The division of labor by operational specialties within the legal corps can lead to the creation or enlargement of institutional authority. Although the United Kingdom has taken the additional step of posting some of its lawyers abroad, this may not be logistically feasible for countries with small staffs, and may in fact become unnecessary as communication technology advances.

3. Improving Legal Advisers' Access to Information

As stated previously, the LA's role does not necessarily correspond to the capacity of international law to override nationalistic economic, political, and diplomatic concerns in any given nation. Nevertheless, some important conditions greatly hinder meaningful input at the decision-making level.

First, the LA must have access to information. In several countries—Hungary and Italy, for example—the LA does not have direct access to the daily cable traffic which enters the ministry.⁶⁰ This means that the LA hears about a given issue only *after* a non-lawyer has determined that an international legal principle might be at stake and has then consulted the LA. Such a system can create numerous problems. A non-lawyer bureaucrat could miss numerous legal overtones in international matters, thus depriving the issue of the LA's attention.

A Hungarian LA defended his lack of direct access to cables by noting that time and personnel constraints prevent their thorough review. This observation, however, should be understood as a manifestation of the need for greater staffing of the LA's office, and not as a reason for maintaining the current system.

4. Improving Access to Policymakers

If LAs are to succeed in introducing international legal considerations into the policy-making calculus, they must also have access to the policymakers. This is especially crucial because in most cases the LA is considered to be part of the bureaucracy, not the decision-making apparatus. Of course, the closer the relationship, both institutionally and personally, between the LA and the decisionmaker, the greater the likelihood of a solid advocacy of the international legal perspective.

There is particular danger that the legal perspective will be lost when the LA is not privy to daily meetings, because diplomats are less likely to seek the LA's input *after* they have already discussed policy options. The LA is excluded in such cases for a number of reasons: fear on the part of diplomats that the LA will proffer an opinion contrary to the decision which they have made; an unwillingness to allow delays that occur while LAs research what policymakers may regard as esoteric and irrelevant questions; and the natural reluctance to consider new information that could upset the hard-won conclusions of previous meetings. Thus, in the absence of formal institutionalization

60. See *supra* note 36 and the accompanying text.

of the LA's input, personality factors may freeze the legal perspective out of the policy-making calculus.

Another essential factor which dramatically affects the extent to which international legal considerations are incorporated into foreign policymaking is the question of whether or not the LA has the right to initiate discussions with the policymakers. This right of initiative comes in both weak and strong forms. In the weak form, the LA is provided an opportunity to present legal proposals relevant to a matter already under consideration by the policymakers. This approach generally exists in countries like the United States where the LAs participate in the staff meetings of the policymakers. The stronger version of the right to initiate—which interviewees from Switzerland and Bulgaria both claim to enjoy—involves the right to actually *propose* policy in foreign affairs, suggesting, for example, that a new treaty be entered into or a new conference convened.

While it is probably true that some individual LAs, by virtue of their personal experience, contacts, or charisma, have exercised this strong form of initiative at different times, *institutionally* requiring it from all LAs would encourage originality on the part of the LAs themselves and would increase policymakers' receptivity to legal advice. Such a change could accelerate considerably the rate at which the LA comes to be recognized not merely as the person who translates foreign policy into legal terms, but also as the person who facilitates the utilization of international law in the overall process of foreign policy formulation.

An additional institutional factor bearing upon the LA's effectiveness in advocating international legal perspectives is whether the LA can pass over those officials hierarchically interposed between him and the key decisionmaker and offer his opinion directly to the top of the hierarchical structure. The institutional existence of such an option clearly has the added advantage of functioning as a check on the heads of other departments, who know that they may have to answer to their superiors' direct queries on legal matters. Providing a clear pathway for the LA to report to key decisionmakers that proposed policies could violate international law is essential because intermediary authorities might not understand the intricacies of such advice.

One possible means of ensuring that the LA has all the rights to information and access to the top policymakers may well be the *up-grading* of the LAs' status within foreign ministries so as to enable them structurally to have a greater role in the decision-making process.

5. Increasing Public Accountability for Legal Advisers' Decisions

Finally, exposing LAs' activities to regular public discussion would help ensure their accountability for advocating respect of international legal standards. As recently suggested by the Joint Committee established by the American Society of International Law and the American Branch of the International Law Association, an annual review and public assessment of LA activities by professional bodies of lawyers could provide legal advisers with important feedback and new ideas.⁶¹ Such reviews could also stimulate LAs to improve their performance. The LAs, of course, would have to furnish these professional associations with at least a summary of the issues they had dealt with over the year, and also would have to participate in the reviews. Admittedly, in some cases LAs might find it inappropriate to air delicate decisions involving politics or national security, or to raise issues still under consideration by legal or policy-making authorities. In such cases, perhaps the chair of the reviewing committee could negotiate with the given LA over which issues needed to be kept confidential because of their political or security implications, or because they were still under debate.

What matters is that LAs should feel accountable to public opinion and, even more importantly, to the expert opinion of professional gatherings of a professional reviewing committee. Greater accountability would ensure transparency, even in the traditional sanctuary of quiet diplomacy. LAs would feel more and more compelled in their daily activities to choose options consonant with international legal standards.

CONCLUSION

At present, greater respect for international law is badly needed to ensure the smoother conduct of international relations. One of the best ways to promote respect for international law lies to a large extent in enhancing the importance of LAs in foreign ministries. If States were to gradually rethink the role of LAs, improve the methods of their appointments, upgrade their functions, and ensure their independence, the stage could be set for expanding the rule of law in international relations.

61. Joint Committee of the American Society of International Law & American Branch of the International Law Association, *The Role of the Legal Advisor in the Department of State*, 85 AM. J. INT'L L. 358, 367-68 (1991). This committee is currently examining the LA's role in the U.S. State Department.